

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
BERNARD AND LORRAINE KIRSCH)

Appearances:

For Appellants: Bernard Kirsch, in pro. per.

For Respondent: Gary Paul Kane
Tax Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Bernard and Lorraine Kirsch for refund of personal income tax in the amount of \$179.45 for the year 1962.

Bernard Kirsch (hereafter referred to as "appellant") was an officer in the United States Air Force. On June 30, 1962, he was released from active military duty due to a reduction in force. At that time appellant received a lump-sum readjustment payment in the amount of \$12,400, pursuant to section 265(a) of the Armed Forces Reserve Act, (66 Stat, 481, as amended, 76 Stat. 120, 50 U.S.C.A. § 1016.) Soon thereafter appellant re-enlisted in the Air Force and on October 31, 1965, he retired, with over twenty years of active military service. Thereupon he repaid to the federal government the sum of \$9,300, which was 75 percent of the amount he had received in 1962. The repayment was made in accordance with the above mentioned federal statute which provided that if a recipient of a readjustment payment subsequently became eligible for retirement, his retirement pay was "subject to the immediate deduction ... of an amount equal to 75 percent of the amount of the readjustment payment, without interest." (50 U.S.C.A. § 1016, subsec. (c).)

Anneal of Bernard and Lorraine Kirsch

Appellant had reported the full \$12,400 as income in his state and federal income tax returns for 1962. Upon repayment of the \$9,300 in 1965, he filed claims for refund wherein he sought to exclude the amount of the repayment from gross income for the year 1962. Appellant received a tax refund from the federal government, but respondent disallowed his refund claim for 1962 on the ground that appellant received the \$12,400 lump-sum readjustment payment in 1962 under a claim of right and it therefore constituted income to appellant in that year, even though he subsequently returned a portion of it. Respondent states that the federal refund was allowed under section 1341 of the Internal Revenue Code of 1954, a special relief section which has no counterpart in California law. It contends that the only course open to appellant is to claim the repayment as a deduction in 1965, the year of repayment.

Appellant urges that he is entitled to a refund of the tax which he paid on the the lump-sum readjustment payment received in 1962 since he knew 75 percent of it would have to be repaid in a subsequent year in order to qualify for full military retirement pay,

The question for decision in this matter is the same as that presented in the An-peal of Arthur G. and Eugenia Lovering, Cal. St. Bd. of Equal., decided on April 21, 1966. In sustaining respondent's denial of the appellant's claim for refund in the Lovering decision, we said:

It is our opinion that appellant did receive the entire lump-sum readjustment payment in 1962 under a claim of right and it was therefore properly included in his gross income for that year. As respondent correctly points out, there is no section in the California statutes which corresponds to section 1341 of the Internal Revenue Code of 1954, under which the federal authorities granted a refund to appellant. Under the circumstances we must sustain respondent in its denial of appellant's claim for refund for 1962.

We do not find any material difference between the facts in this appeal and those presented in Lovering. Accordingly, we conclude that respondent properly denied appellant's claim for refund for 1962,

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O R D E R

Pursuant to the views expressed in the opinion
Of the board on file in this proceeding, and good cause
appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED,
pursuant to section 19060 of the Revenue and Taxation
Code, that the action of the Franchise Tax Board in
denying the claim of Bernard and Lorraine Kirsch for
refund of personal income tax in the amount of \$179.45
for the year 1962, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day
of October, 1967, by the State Board of Equalization.

Paul R. Leake, Chairman

John W. Lynch, Member

Arthur H. Kelson, Member

George H. Kelson, Member

George H. Kelson, Member

ATTEST: W. F. Kelson, Secretary